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Case No. 15-9173

CAPITAL CASE

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2015

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SHAUN MICHAEL BOSSE,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... i

STATEMENT OF THE CASE ..... 1

STATEMENT OF THE FACTS ..... 2

REASONS FOR DENYING THE WRIT ..... 8

OKLAHOMA LAW ALLOWING THE ADMISSION OF VICTIM IMPACT STATEMENTS WHICH INCLUDE RECOMMENDATION OF SENTENCE IS NOT CONTRARY TO THE UNITED STATES CONSTITUTION OR THIS COURT'S CASE LAW ..... 8

A. *Payne v. Tennessee* ..... 9

B. Oklahoma Law Regarding Victim Impact Evidence ..... 10

C. Victim Impact Evidence in Petitioner's Case ..... 12

CONCLUSION ..... 15

## TABLE OF AUTHORITIES

PAGE

### FEDERAL CASES

*Booth v. Maryland*,
482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). ..... 8, 9, 10, 11

*Burt v. Titlow*,
__U.S.__, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013) ..... 16

*California v. Ramos*,
463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983) ..... 9

*DeRosa v. Oklahoma*,
543 U.S. 1063, 125 S. Ct. 889, 160 L. Ed. 2d 793 (2005) ..... 13

*DeRosa v. Workman*,
679 F.3d 1196 (10th Cir. 2012) ..... 12

*Payne v. Tennessee*,
501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ..... Passim

*Romano v. Oklahoma*,
512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) ..... 11

*Stone v. Powell*,
428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) ..... 16

*Welch v. Oklahoma*,
528 U.S. 829, 120 S. Ct. 83, 145 L. Ed. 2d 70 (1999) ..... 13

### STATE CASES

*Bosse v. State*,
360 P.3d 1203 (Okla. Crim. App. 2015) ..... Passim

*Conover v. State*,
933 P.2d 904 (Okla. Crim App. 1997) ..... 11

*Malone v. State*,
168 P.3d 185 (Okla. Crim. App. 2007) ..... 11

*Miller v. State*,
29 P.3d 1077 (Okla. Crim. App. 2001) ..... 11

*Murphy v. State*,
47 P.3d 876 (Okla. Crim. App. 2002) ..... 13

*Salazar v. State*,
973 P.2d 315 (Okla. Crim. App. 1998) ..... 12

## STATE STATUTES

Okla. Stat. tit. 21, § 142A (2011) ..... 10

Okla. Stat. tit. 21, §§ 142A-1 (2011) ..... 10

Okla. Stat. tit. 21, § 142A-1(8) (2011) ..... 10

Okla. Stat. tit. 21, § 142A-8 (2011) ..... 10

Okla. Stat. tit. 21, § 701.12 (2011) ..... 2

Okla. Stat. tit. 21, § 701.13(C) ..... 15

Okla. Stat. tit. 22, § 984 (1992) ..... 10

Okla. Stat. tit. 22, § 984(1) (1992) ..... 11

Okla. Stat. tit. 22, § 984.1 (1992) ..... 10

## FEDERAL RULES

Rule 10, Rules of the Supreme Court of the United States ..... 8, 13

## CAPITAL CASE
## QUESTION PRESENTED

**Whether the admission of victim impact statements which include a short, concise statement recommending the jury impose the death sentence, as provided for under Oklahoma statutory law, violates the Eighth Amendment of the United States Constitution, despite the Oklahoma Court of Criminal Appeals' requirement that such evidence be evaluated for admissibility under the more prejudicial than probative standard and the due process required by the Fourteenth Amendment?**

Case No. 15-9173

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**SHAUN MICHAEL BOSSE**
***Petitioner,***

**-vs-**

**THE STATE OF OKLAHOMA**
***Respondent.***

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**On Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals**

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully urges this Court to deny the petition for writ of certiorari to review the Opinion of the Oklahoma Court of Criminal Appeals entered October 16, 2015. *See Bosse v. State*, 360 P.3d 1203 (Okla. Crim. App. 2015).

## STATEMENT OF THE CASE

Petitioner is currently incarcerated pursuant to a Judgment and Sentence entered in the District Court of McClain County, Case No. CF-2010-213, convicting him of three counts of first degree murder and one count of first degree arson. Petitioner's convictions are the result of a jury trial in which he was found guilty beyond a reasonable doubt of murdering Katrina Griffin and her two children, eight-year-old Christian Griffin, and six-year-old Chasity Hammer, in Ms. Griffin's home, and then setting the home on fire. The jury found the existence of three aggravating circumstances for each murder count, namely: (1) during the commission of each murder, the defendant knowingly created a great risk of death to more than one person; (2) each murder was especially heinous, atrocious or cruel; and (3) each murder was committed for the purpose of

avoiding or preventing a lawful arrest or prosecution. *See* Okla. Stat. tit. 21, § 701.12 (2011). At the conclusion of Petitioner's trial, the jury recommended sentences of death for the murders, and thirty-five years imprisonment for the arson. The trial court sentenced Petitioner accordingly on December 18, 2012.

From his convictions, Petitioner filed a direct appeal with the Oklahoma Court of Criminal Appeals (OCCA). On October 16, 2015, the OCCA affirmed Petitioner's convictions and sentences. *See Bosse v. State*, 360 P.3d 1203, 1236 (Okla. Crim. App. 2015). Petitioner sought a rehearing in the OCCA which was denied on December 1, 2015. *See* 12/01/2015 Order, OCCA Case No. D-2012-1128 (unpublished). Petitioner's application for post-conviction relief was denied by the OCCA in an unpublished order on December 16, 2015. *See Bosse v. State*, OCCA Case No. PCD-2013-360, slip op. (Okla. Crim. App. December 16, 2015) (unpublished).

## STATEMENT OF THE FACTS[1]

Katrina Griffin lived with her two children, Christian Griffin and Chasity Hammer, in a mobile home located on her father's rural McClain County property near Dibble, Oklahoma (1 Tr. 30-34). For the most part, Katrina stayed home because she suffered seizures that prevented her either from driving or working (1 Tr. 35-36, 49). In early July 2010, Katrina met Petitioner on the internet and the two started dating (1 Tr. 38-41, 44; 2 Tr. 88-89, 121). Petitioner quickly became part of Katrina's world. On the evening of July 17, 2010, Petitioner hung out with Katrina, her cousin Heather Molloy and Molloy's boyfriend Henry Price, at Katrina's trailer. They played video games, drank beer and listened to music (2 Tr. 88-91,127-130).

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[1] References to the Trial Transcripts will be designated as "(Vol. No.) Tr." followed by the page number. References to the Original Record will be designated as "O.R." followed by the page number.

On July 22, 2010, around 6:00 p.m., Petitioner arrived for a visit at Katrina's trailer (1 Tr. 45-46). Ginger Griffin, Katrina's step-mother, briefly entered Katrina's trailer that night when she dropped Chasity and Christian off after a visit next door to her home. Petitioner and Katrina were sitting on the love seat in the living room, using the laptop (1 Tr. 47-48, 58-59). Later that evening, Mrs. Griffin received a phone call from Christian asking if he had left any of his video games at her house (1 Tr. 59). When Mrs. Griffin responded that Christian had not left any of his video games behind but, instead, took them home, Katrina got on the line and asked the same question (1 Tr. 59). At some point during this conversation, Katrina said she was getting another call from her biological mother, Rebecca Allen, and needed to take it (1 Tr. 59; 2 Tr. 112).

Ms. Allen spoke with Katrina several times that evening about the missing video games. Katrina was upset because Christian's video games were missing from the trailer. During the first conversation, which occurred around 10:00 p.m., Katrina said Petitioner and the children were present at the trailer with her. Katrina expressed her intent to try and find the missing video games that night (2 Tr. 117-18). Katrina believed Henry Price was responsible for their theft and told her mother that Petitioner was going to drive her to Heather Molloy's home in search of the missing video games (2 Tr. 124). Katrina left several text and phone messages for Molloy after 10:00 p.m. that night. Molloy was asleep, however, and did not see these messages until the next morning (2 Tr. 92-93, 96). Malloy described Katrina's messages as sounding "upset . . . because her son's video games were missing" and that Katrina sounded "a little mad" (2 Tr. 96-97). In one message, Katrina told Molloy "she knew where I lived and that they [were] going to come by." (2 Tr. 97). In another, Katrina wrote that she went to Molloy's house and banged on the door (2 Tr. 98).

Unsuccessful in finding the missing video games, Katrina called the McClain County Sheriff's Office to make a report. At 11:39 p.m., Deputy Kent Cunningham was dispatched to Katrina's mobile home. Deputy Cunningham arrived around 11:52 p.m. on July 22nd and found Katrina, her two children and an adult white male at the trailer. Katrina explained to the deputy that approximately fifteen (15) video games from her children's collection went missing after Malloy and Price visited her trailer the previous Saturday, July 17th (2 Tr. 100-105). Katrina spoke with her mother for the last time by phone sometime between 12:30 and 1:00 a.m. (2 Tr. 117). She told Allen that the deputy had just left, she was getting tired and was going to bed (2 Tr. 119). Katrina's mother believed everything had "calmed down" and Katrina told her mother she would see her tomorrow (2 Tr. 119). Allen, who lived in Enid, Oklahoma, planned to drive to Dibble the next day and take Chasity back to Enid for a short visit (2 Tr. 119-121).

Ginger Griffin left for work around 7:00 a.m., July 23, 2010 (1 Tr. 62). Mrs. Griffin looked at Katrina's trailer that morning as she drove past but saw nothing unusual (1 Tr. 63). Griffin did not see Petitioner's truck; nor did she notice any smoke (1 Tr. 63). Daryl Dobbs lived in the Griffins' rural neighborhood (1 Tr. 87-89). At 8:55 a.m., Dobbs left home (1 Tr. 90). While driving out of the neighborhood, he saw smoke coming from the top of Katrina's mobile home on the west side of the trailer (1 Tr. 91-92). Dobbs backed up and drove towards Katrina's trailer while honking his horn in a furious attempt to get the attention of anyone nearby (1 Tr. 91-92). Dobbs called 911 and reported the fire (1 Tr. 94-95).

At 9:02 a.m., Walt Thompson, the Dibble police chief, responded to the fire based on Dobbs's 911 call (1 Tr. 125, 127). Chief Thompson arrived at the scene within minutes (1 Tr. 107, 132). Bill Scott and Mark Palmore, volunteer firemen from Dibble, soon arrived with the town's

1,100-gallon fire engine (1 Tr. 144-145, 177-178). Clad in their self-contained breathing apparatuses, the Dibble firemen made an immediate assault on the fire with water suppression at the front door. They fought back smoke and flames coming from the living room and dining room areas adjacent to the front door so they could enter (1 Tr. 178-180, 186). During their search, the smoke inside was intense as the heat continued to rise; visibility "was next to nothing" as the Dibble firemen searched and cleared the two bedrooms and one bathroom on the north end of the trailer. They eventually retreated outside when their oxygen tanks started to run low (1 Tr. 180-182).

Volunteer firemen from nearby Washington, Oklahoma, responding to a mutual aid request, relieved Scott and Palmore and made their way inside through the front door, towards the south side of the trailer, in search of victims (2 Tr. 12-19). Firemen Derek Cheek and Gary Bolster were crouching very low to navigate through the thick, black smoke (2 Tr. 19). The Washington firemen searched the living room, kitchen and utility room area but found only a few small flames which they quickly extinguished (2 Tr. 19-21, 42-43). The door separating the master bedroom from the rest of the trailer was closed and was warm to the touch. With no visible signs of flames, Cheek—with some effort—opened the door. Inside, they found the bodies of Katrina and Christian laying on the floor (2 Tr. 21-25).

Because of a problem with their hose, the Washington firemen retreated back outside in the middle of their search of the master bedroom (2 Tr. 25-27). When the fire was finally extinguished and firemen returned inside, they discovered a much different scene compared to their initial entry. The bodies of Katrina and Christian had extensive burning and were covered in debris not present when the Washington firemen first found them (2 Tr. 39-41, 43). Worse yet, the severely charred body of Chasity Hammer was discovered inside what was left of the master bedroom closet, covered

in charred debris (2 Tr. 34; 4 Tr. 98-100; 6 Tr. 31, 34; State's Exhibits 36-37). Additionally, investigators discovered what appeared to be blood spatter from cast off and arterial blood spurts on the lower bedroom walls near Christian's body. Notably, Christian's head was partially wrapped in a blanket and he was clothed only in a pair of unbuttoned, unzipped jean shorts and underwear. Christian had five (5) stab wounds to the neck and chest. A stab wound to his right forearm was consistent with being a defensive wound. Blunt force trauma over Christian's right eyebrow was also evident (4 Tr. 113-115, 141-143, 148-155; 6 Tr. 13, 18-20; State's Exhibits. 43, 45, 81, 87).

Katrina's body—clothed in a t-shirt, shorts and underwear—was badly burned and had eight (8) stab wounds to the neck and abdomen (4 Tr. 156; 5 Tr. 223). Blunt force trauma to the right side of her head was also observed (5 Tr. 225). Katrina's face was charred and the eyeglasses she normally wore, and many times fell asleep in, were still attached to her burned hair (1 Tr. 57-58; 5 Tr. 223). Incised wounds on the palm of Katrina's right hand were classified as defensive wounds by the medical examiner (5 Tr. 229, 237-238). Katrina's legs were found laying over Christian's legs and her body was covered in debris from the fire (4 Tr. 115-116; State's Exhibit 47). Katrina's shirt was bunched up over head, her hands and arms were crossed and her body was stretched out on its side (4 Tr. 116-117, 124; State's Exhibit 48). This was consistent with Katrina's body having been drug with her arms over her head (4 Tr. 117). In Katrina's right hand was a knife (4 Tr. 118; State's Exhibit 49). This was unusual because Katrina was left-handed and the knife blade was found facing her body (3 Tr. 94; 4 Tr. 118). The knife was completely backwards in her hand—the opposite of how someone using a knife would hold it (3 Tr. 95). Additionally, a knife with a broken-off blade belonging to Christian was found underneath Katrina's body (4 Tr. 121-122; State's Exhibit 52).

The medical examiner determined the cause of death for both Katrina and Christian was multiple stab wounds (5 Tr. 247; 6 Tr. 30). Neither Katrina nor Christian had soot in their noses or mouths, suggesting they were murdered prior to the home being set on fire (5 Tr. 223; 6 Tr. 13-14). The medical examiner observed no stab wounds on Chasity's remains but did observe blunt force trauma to the right side of her head which resulted in a bruise (6 Tr. 31-32). Chasity's legs were charred to the muscle and bone was exposed (6 Tr. 33). Chasity's cause of death was smoke inhalation and thermal injury (6 Tr. 83). "[T]hat is, she burned to death." *Bosse*, 360 P.3d at 1227.

Forensic testing of stains found on Petitioner's tennis shoes, as well as a pair of blue jeans rolled into a ball and placed inside the back of Petitioner's bedroom closet, tested positive for blood (2 Tr. 233-236; 4 Tr. 185-186, 189, 193-194; 7 Tr. 67-72). DNA testing of the bloodstain on Petitioner's jeans revealed the presence of both Chasity's and Petitioner's genetic profiles (7 Tr. 102-107). DNA testing of Petitioner's tennis shoes revealed the presence of Chasity's and Katrina's genetic profiles (7 Tr. 108-110). Police discovered that Petitioner pawned numerous movies, televisions and other electronic equipment belonging to Katrina Griffin at seven (7) different Oklahoma City pawnshops the morning of July 23, 2010 (3 Tr. 57-63, 119-237, 267-75; 4 Tr. 31-64). Several of the DVD movies Petitioner pawned (or, in some cases, attempted to pawn) had the handwritten letters "KRG" which police discovered were handwritten initials placed by Katrina on all the movies she owned (1 Tr. 53-54; 3 Tr. 57-63, 126, 160-161, 214-215). Several DVD movies recovered from a stack found on top of Petitioner's bed also had Katrina's initials (4 Tr. 191-192; State's Exhibit 193). A television remote control found in Petitioner's truck likewise matched one of Katrina's televisions that Petitioner had pawned (4 Tr. 206). Additional facts may be presented below as they become relevant.

## REASONS FOR DENYING THE WRIT

Petitioner believes the OCCA has incorrectly interpreted this Court's holding in *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), in which this Court held that "the Eighth Amendment erects no *per se* bar" to the admission of victim impact evidence admitted at trial. *Payne*, 501 U.S. at 827, 111 S. Ct. at 2609. This Court in *Payne* overruled its previous holding in *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), in which this Court held that this admission of victim impact evidence violated the Eighth Amendment. *Booth*, 482 U.S. at 509, 107 S. Ct. at 2536. While the OCCA's interpretation of *Payne* is in conflict with the United States Court of Appeals for the Tenth Circuit, the OCCA's opinion demonstrates that Oklahoma law properly safeguards Petitioner's Constitutional rights within the limits of *Payne* in the admission and review of victim impact evidence admitted at trial. Thus, the OCCA has not "decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10, *Rules of the Supreme Court of the United States*. This Court should not grant certiorari to review this particular case.

### OKLAHOMA LAW ALLOWING THE ADMISSION OF VICTIM IMPACT STATEMENTS WHICH INCLUDE RECOMMENDATION OF SENTENCE IS NOT CONTRARY TO THE UNITED STATES CONSTITUTION OR THIS COURT'S CASE LAW.[2]

Petitioner claims Oklahoma's admission of victim impact evidence concerning a recommendation of sentence is contrary to this Court's holdings in *Payne* and *Booth*. Specifically, Petitioner claims that *Payne* left *Booth's* Eighth Amendment prohibition against opinions concerning

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[2] Contrary to Petitioner's assertions, this case does not involve victim characterizations of the crime or victim characterizations of the Petitioner. *See* 10 Tr. 197-223. Accordingly, this is not an appropriate case to determine those issues.

sentence recommendations untouched. Petitioner claims the OCCA's interpretation of *Payne*-that this Court overruled *Booth* in its entirety, or alternatively, this Court left open the question of the admissibility of opinion evidence concerning sentence recommendations-is in conflict with the United State's Court of Appeals for the Tenth Circuit and other state courts. However, as will be shown below, this Court should not grant certiorari in this case.

**A. *Payne v. Tennessee.***

In 1991, this Court explicitly overruled prior precedent in determining that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827, 111 S. Ct. at 2609. In reaching this conclusion, this Court reasoned that, "[u]nder our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne*, 501 U.S. at 824, 111 S. Ct. at 2607. While recognizing that the Eighth Amendment imposed special limitations on this process, this Court noted that "beyond these limitations the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *Payne*, 501 U.S. at 824, 111 S. Ct. at 2608 (citing *California v. Ramos*, 463 U.S. 992, 1001, 103 S. Ct. 3446, 3453, 77 L. Ed. 2d 1171 (1983)) (brackets and ellipsis omitted).

This Court removed victim impact evidence out from under Eighth Amendment scrutiny noting that "victim impact evidence serves entirely legitimate purposes," in that victim impact evidence "is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Payne*, 501 U.S. at 825, 111 S. Ct. at 2608. Finally, this Court held that "[i]n the event

that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* Thus, *Payne* made it clear that the states were again free to establish procedures for the introduction of victim impact evidence, subject to the criminal defendant's right to due process of law.

**B. Oklahoma Law Regarding Victim Impact Evidence.**

One year after the *Payne* decision, the Oklahoma Legislature specifically provided for the admission of victim impact evidence in sentencing considerations. *See* Okla. Stat. tit. 22, §§ 984, 984.1 (1992).[3] Currently, the Oklahoma Victim's Rights Act (Okla. Stat. tit. 21, § 142A (2011) *et seq.*) provides that members of the immediate family of each victim "may present a written victim impact statement," which shall be allowed to "be read into the record." Okla. Stat. tit. 21, § 142A-8 (2011). The Act defines a victim impact statement as:

> "Victim impact statements" means information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, or person designated by the victim or by family members of the victim and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the opinion of the victim of a recommended sentence.

Okla. Stat. tit. 21, § 142A-1(8) (2011). Petitioner is challenging the admission of a victim's opinion of a recommended sentence[4] as violating the Eighth Amendment pursuant to *Booth*, 482 U.S. at 509, 107 S. Ct. at 2536. However, "[t]he Eighth Amendment does not establish a federal code of

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[3] These statutes have since been modified and renumbered as Okla. Stat. tit. 21, §§ 142A-1, 142A-8 (2011). *See* 1997 Okla. Sess. Laws Ch. 357, § 2; 2010 Okla. Sess. Laws Ch. 135, §§ 3, 14, 19.

[4] Petitioner also challenges victim characterizations of the circumstances surrounding the crime. However, no such characterization was given at Petitioner's trial. *See* 10 Tr. 197-223.

evidence to supersede state evidentiary rules in capital sentencing proceedings." *Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S. Ct. 2004, 2011, 129 L. Ed. 2d 1 (1994).

The OCCA has taken the position that *Payne* overruled *Booth* and its prohibition of victim impact evidence. *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim App. 1997) ("*Payne* also implicitly overruled that portion of *Booth* regarding characterizations of the defendant and opinions of the sentence. Therefore, contrary to Appellant's argument, *Payne* and not *Booth*, is the controlling case on this issue.") (internal citations omitted). More importantly, the OCCA also acknowledges the possible prejudicial impact of this type of evidence.

> Opinion evidence by victim impact witnesses that the defendant deserves death is admissible but will be viewed by this Court with a heightened degree of scrutiny. By enacting [Okla. Stat. tit. 22,] § 984(1), the Legislature has in effect declared such evidence both relevant and admissible. *Id.* However, that does not end the discussion. As with any evidence sought to be admitted, the district court must decide whether its probative value is substantially outweighed by its prejudicial effect. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

*Conover*, 933 P.2d at 921 (internal citations omitted). Further, the OCCA also limits the evidence "to a simple statement of the recommended sentence without amplification." *Id.*

The protections required in *Payne* are present in Oklahoma case law. *See Malone v. State*, 168 P.3d 185, 204-215 (Okla. Crim. App. 2007) (finding clear plain error in victim widow's lengthy statement recommending death, and remanding for re-sentencing); *Miller v. State*, 29 P.3d 1077, 1086 (Okla. Crim. App. 2001) (finding counsel ineffective for failing to object to amplified victim impact evidence which contributed to error requiring defendant's conviction and sentence to be reversed and remanded for a new trial); *Washington v. State*, 989 P.2d 960, 977-980 (Okla. Crim.

App. 1999) (finding improper recommendation of death contributed to error requiring modification of sentence from death to life without parole); *Salazar v. State*, 973 P.2d 315, 325 (Okla. Crim. App. 1998) (finding mother's recommendation of death was over amplified, but harmless in light of the overwhelming aggravating circumstances).

**C. Victim Impact Evidence in Petitioner's Case.**

Petitioner first raised this issue prior to trial by filing a motion to prohibit the family members providing victim impact evidence from including a punishment recommendation (O.R. 772-783). The motion was argued prior to the penalty phase of Petitioner's trial (10 Tr. 9-13). The prosecution informed the trial court that its intent was to ask the victims if they had a recommendation of punishment to illicit the one-word response of "death." (10 Tr. 10). The trial court overruled Petitioner's motion (10 Tr. 12). During the penalty phase, after reading their victim impact statements, Rebecca Allen, Katrina's mother and Christian and Chasity's grandmother, Ginger Griffin, Katrina's stepmother and Christian and Chasity's step-grandmother, and Johnny Griffin, Katrina's father and Christian and Chasity's grandfather each responded with the one-word answer of "death" to the prosecution's inquiry of what their punishment recommendation was (10 Tr. 202, 212, 223).

Petitioner again raised this claim on direct appeal to the OCCA. The OCCA held:

> [Petitioner] argues that the Tenth Circuit has routinely disagreed with this Court's reasoning on this issue, and asks this Court to reconsider its position. *See, e.g., DeRosa v. Workman*, 679 F.3d 1196, 1240 (10th Cir. 2012). While always mindful of the respect due to other courts, the Tenth Circuit's interpretation of this issue is not binding on this Court. We decline the invitation to reconsider our consistent position on this issue.

*Bosse*, 360 P.3d at 1226. The OCCA, after reviewing all of the victim impact evidence, including sentence recommendations, held "[t]he trial court did not abuse its discretion in admitting the evidence." *Bosse*, 360 P.3d at 1227. The OCCA's disagreement with the Tenth Circuit is not improper, nor does it conflict with relevant decisions of this Court. Rule 10, *Rules of the Supreme Court of the United States*.

Petitioner argues that the OCCA's reliance in *Murphy v. State*, 47 P.3d 876 (Okla. Crim. App. 2002) on its belief that this Court had denied certiorari in *Turrentine v. Oklahoma*, 525 U.S. 1057, 119 S. Ct. 624, 142 L. Ed. 2d 562 (1998) on this very issue was incorrect.[5] However, more to the point, the OCCA decided the ultimate issue concerning the victim impact evidence by applying the standard in *Payne*, holding that, "the victim impact evidence was not 'so unduly prejudicial that it render(ed) the trial fundamentally unfair.'" *Payne*, 501 U.S. at 825, 111 S. Ct. at 2608." *Murphy*, 47 P.3d at 886.

Regardless of the OCCA's mention that it denied certiorari on a similar issue, it properly addressed the issue consistent with this Court's decision in *Payne*. Thus, the OCCA's interpretation was not in conflict with relevant decisions of this Court. Rule 10, *Rules of the Supreme Court of the United States*. Nor was its denial of relief in this case. Moreover, fatal to Petitioner's argument is that it is based on the OCCA's decisions in other cases, rather than challenge the substantive holding in the present case.

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[5] Petitioner notes that this issue was not even before this Court in *Turrentine*. The State agrees that this issue was not raised to this Court by Kenneth Turrentine until his fourth petition for certiorari, which was denied by this Court (*Turrentine v. Mullin*, 545 U.S. 1106, 125 S. Ct. 2544, 162 L. Ed. 2d 278 (2005)) three years after the OCCA decided *Murphy*. However, this Court has denied certiorari on this exact issue at least one time prior to *Murphy* (*Welch v. Oklahoma*, 528 U.S. 829, 120 S. Ct. 83, 145 L. Ed. 2d 70 (1999) and at least one time since (*DeRosa v. Oklahoma*, 543 U.S. 1063, 125 S. Ct. 889, 160 L. Ed. 2d 793 (2005).

In this case, the victims' brief one-word plea for the death penalty should be contrasted with the parade of fifteen (15) family members, friends, and other acquaintances that testified that Petitioner should be spared the death penalty and that they otherwise wished to see Petitioner live.[6] Much of this Court's reasoning in *Payne* centered around the potential for unfairness that exists when a defendant is given an almost unlimited right to present mitigating evidence without a corresponding right for the state to present evidence of the value of the victim's life. *Payne*, 501 U.S. at 822, 825-827. Accordingly, even if Petitioner is correct that *Payne* does not allow for sentencing recommendations by a victim's family, the harm from the recommendation in this case must be offset by the more extensive and elaborate pleas made by Petitioner's family and friends.

Respondent submits that this case is not a good case for determining whether an opinion about a punishment recommendation violates the Eighth Amendment. The facts of this case show Petitioner committed a horrific crime. *Bosse*, 360 P.3d at 1227-1228. The jury found the existence of three aggravating circumstances, and that those aggravating circumstances outweighed the rather non-compelling mitigation evidence. Further, the prosecution elicited only a one-word sentence recommendation, without amplification. It cannot be said that without this open court recommendation of death, the jury would not have sentenced Petitioner as such. The jury was aware the prosecution was seeking the death penalty in this case, surely the jury was already aware of the victim's recommendation.

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[6] Pastor Travis Hopper, 11 Tr. 74; Cousin Ricky Darnell, 11 Tr. 96; Baseball Coach Tony Hancock, 11 Tr. 109; Cousin Trisha McAlpine, 11 Tr. 119; Aunt Valerie Barnett, 11 Tr. 125; Great Uncle Johnny Pendley, 11 Tr. 129; Baseball Coach Daryl Mitchell, 11 Tr. 135; Best Friend Chad Mitchell, 11 Tr. 164; Father Jack Bosse, 11 Tr. 197; Cousin Joey Darnell, 11 Tr. 215; Uncle Jimmy Darnell, 11 Tr. 233; Aunt Ruth Williams, 12 Tr. 23; Brother Matthew Bosse, 12 Tr. 38, 49; Mother Verna Bosse, 12 Tr. 104-106; Grandma Ruby Darnell, 12 Tr. 148-149.

Finally, Petitioner's right to due process is further protected by the OCCA's mandatory sentence review in capital cases. Oklahoma law commands the OCCA to determine, "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . ." Okla. Stat. tit. 21, § 701.13(C). When "determining whether the sentences of death were imposed under the influence of passion, prejudice or any other arbitrary factor . . . . [W]e review . . . to determine whether there was sufficient evidence from which a rational sentencer could find that the balance of aggravating and mitigating circumstances warranted a death sentence." *Bosse*, 360 P.3d at 1235-1236 (internal citations and quotations omitted).

The OCCA concluded, "After thoroughly reviewing the entire trial proceedings, we find the death penalty was not imposed under the influence of passion, prejudice or any other arbitrary factor. No improperly admitted evidence or argument affected the jury's determination of sentence. The sentences of death are factually substantiated and appropriate." *Bosse*, 360 P.3d at 1236. Accordingly, the victim's recommendations did not deny Petitioner his right to due process. The proceedings as a whole show that the punishment stage of Petitioner's trial was not fundamentally unfair.

## CONCLUSION

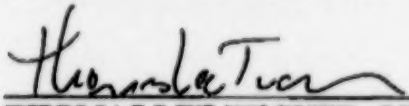
Petitioner's claim that the Oklahoma Victim's Rights Act and OCCA's interpretation of *Payne* is in conflict with the United States Court of Appeals for the Tenth Circuit is un-compelling. While the Tenth Circuit disagrees with Oklahoma law, that disagreement is not such the "important federal question" required to grant certiorari. "[T]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his

neighbor in the state courthouse." *Burt v. Titlow*, __U.S.__, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013) (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) (internal quotation marks omitted). Rather, it is ultimately a disagreement over Oklahoma procedural rules and the rules of evidence, with no Constitutional undertones. "[I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827, 111 S. Ct. at 2609.

Accordingly, for the reasons stated above, Respondent respectfully requests this Court deny the petition for writ of certiorari.

Respectfully submitted,

**E. SCOTT PRUITT**
**ATTORNEY GENERAL OF OKLAHOMA**



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No. 15-9173

IN THE SUPREME COURT OF THE UNITED STATES

SHAUN MICHAEL BOSSE,
Petitioner,

vs.

THE STATE OF OKLAHOMA,
Respondent.

## CERTIFICATE OF SERVICE

I, Thomas Lee Tucker, a member of the Bar of this Court, hereby certifies that a copy of the foregoing was mailed by first-class, postage prepaid mail, to the counsel for Petitioner:

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Dated: June 2, 2016

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